

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV -7 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0109-PR
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
COREY DeNEIL BARNUM,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20001966

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

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Corey DeNeil Barnum

Winslow  
In Propria Persona

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, petitioner Corey Barnum was convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole for twenty-five years. This court affirmed his conviction and sentence on appeal. *See State v. Barnum*, No. 2 CA-CR 2001-0352 (memorandum decision filed June 30, 2003). Barnum subsequently filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Thereafter, his

appointed counsel filed a notice of review avowing she saw no meritorious issues to raise, and the trial court granted Barnum leave to file his own petition for post-conviction relief.

¶2 In that petition,<sup>1</sup> Barnum claimed he was entitled to relief on the ground the trial court had denied him due process (1) by precluding the testimony of his medical experts and (2) by providing an erroneous jury instruction regarding premeditation. The court summarily dismissed the petition, finding both claims precluded, and Barnum challenges that finding in his petition for review.<sup>2</sup> Absent an abuse of discretion, we will not disturb the court's order denying post-conviction relief. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶3 Although Barnum asserts the “denial of expert witness testimony denied [him] due process,” this court previously considered and rejected this very argument. On appeal, Barnum had argued the trial court denied him due process by precluding two doctors from

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<sup>1</sup>When Barnum failed to file his *pro se* petition in 2004, the court found he had “waived his right to file the petition,” but it did not expressly dismiss the proceeding. In 2006, when Barnum filed a motion to extend time pursuant to Rule 32.1(f), Ariz. R. Crim. P., he alleged he “[wa]s still awaiting [the] Record of Appeal” from his attorney and stated he could not “file [a] proper claim” without it. The trial court granted the extension following a status conference, and it granted five additional extensions to allow Barnum time to acquire documents relevant to his case. Although the trial court later characterized Barnum's motion in 2006 as initiating a successive proceeding, we need not reach this issue, for the status of Barnum's petition for post-conviction relief does not affect any of the claims raised therein.

<sup>2</sup>We do not address Barnum's claims that his trial and appellate counsel provided ineffective assistance, as these are raised for the first time in his petition for review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues first presented in petition for review that “have obviously never been presented to the trial court for its consideration”).

testifying about damage to his frontal lobe and its effect on his impulse control. Specifically, Barnum had claimed this testimony was admissible character trait evidence that showed the murder was not premeditated. We determined, however, “the testimony was not evidence of a character trait of impulsivity but rather inadmissible evidence of diminished capacity or irresistible impulse.” *Barnum*, No. 2 CA-CR 2001-0352, ¶ 28. Accordingly, we found no error and “no due process violation” in the exclusion of the testimony. *Id.* ¶ 31. Therefore, as the trial court correctly found, Barnum may not again challenge this evidentiary ruling in a post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(a)(2) (in post-conviction proceeding, defendant precluded from relief based on any ground “[f]inally adjudicated on the merits on appeal”).

¶4 Barnum’s argument regarding the premeditation instruction is likewise precluded because we have previously addressed and resolved it. In our memorandum decision, we agreed with Barnum that the trial court had mistakenly instructed the jury that proof of actual reflection before the killing was not required for Barnum’s act to be premeditated. *Barnum*, No. 2 CA-CR 2001-0352, ¶ 19. Nevertheless, we found the erroneous instruction to be harmless in light of the overwhelming evidence that Barnum had acted with reflection in killing his victim, as proscribed by A.R.S. §§ 13-1101(1) and 13-1105(A)(1). *Barnum*, No. 2 CA-CR 2001-0352, ¶¶ 13, 20.

¶5 Barnum also claims, as he did below, that *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), was a significant change in the law entitling him to relief. But, far from being a significant change in the law, the Ninth Circuit’s reasoning in *Polk* parallels our

memorandum decision to the extent it found a similar premeditation instruction erroneous. *See id.* at 910-11. And, although that court rejected the state’s argument that the error was harmless, it did so based on specific features of the Nevada case before it not pertinent to this Arizona case. *See id.* at 912 (addressing underlying facts suggesting jury may have returned different verdict if properly instructed on Nevada’s first-degree murder standard requiring showing that killing was “willful, deliberate and premeditated”), *quoting* Nev. Rev. Stat. § 200.030(1)(a); *compare* A.R.S. §§ 13-1101(1) and 13-1105(A)(1) (allowing for first-degree murder conviction exclusively on showing of “premeditation”).

¶6 Because Barnum has not sustained his burden of establishing the trial court abused its discretion by summarily dismissing his petition for post-conviction relief, we grant review but deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge